

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 GREGORY FOLEY,

12 Petitioner,

13 v.

14 SCOTT KERNAN, Secretary, et al.,

15 Respondents.
16

Case No.: 16-CV-408 JLS (BGS)

**ORDER ADOPTING REPORT AND
RECOMMENDATION RE
PETITION FOR HABEAS CORPUS
AND DENYING AS MOOT MOTION
FOR REVIEW**

(ECF Nos. 37, 48, 50)

17
18 Petitioner has filed a Petition for Writ of Habeas Corpus, (“Petition,” ECF No. 1),
19 to which Respondent Scott Kernan has filed an Answer, (ECF No. 26). Petitioner then
20 filed a Traverse, (ECF No. 36). Magistrate Judge Bernard G. Skomal issued a Report and
21 Recommendation, recommending the Court deny Petitioner’s Petition and deny his
22 Request for Evidentiary Hearing, (“R&R,” ECF No. 37). Petitioner filed objections to the
23 R&R. (“R&R Obj.,” ECF No. 42.) Respondent did not file a reply to Petitioner’s
24 objections. Petitioner also filed Motion to Review his prior Motion for 2nd Extension of
25
26
27
28

1 Time, (ECF No. 48),¹ and an *ex parte* motion to determine the disposition of his writ of
2 habeas corpus, (ECF No. 50).²

3 Having considered the Parties' arguments and the law, as well as the underlying state
4 court record, the Court **OVERRULES** Petitioner's Objections, **ADOPTS** Judge Skomal's
5 Report and Recommendation, and **DENIES** Petitioner's Petition for Habeas Corpus.

6 **BACKGROUND**

7 Judge Skomal's Report and Recommendation contains a complete and accurate
8 recitation of the relevant portions of the factual and procedural histories underlying
9 Defendant's pending Motion to Dismiss. (*See* R&R 3–16.)³ This Order incorporates by
10 reference the background as set forth therein.

11 **LEGAL STANDARD**

12 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district
13 court's duties in connection with a magistrate judge's R&R. The district court must "make
14 a de novo determination of those portions of the report or specified proposed findings or
15 recommendations to which objection is made," and "may accept, reject, or modify, in
16 whole or in part, the findings or recommendations made by the magistrate judge." 28
17 U.S.C. § 636(b)(1); *see also United States v. Raddatz*, 447 U.S. 667, 673–76 (1980); *United*
18 *States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989). However, in the absence of timely
19

20
21 ¹ Petitioner's Motion to Review asks the Court to accept his prior motion for a second extension of time
22 to respond to Judge Skomal's R&R, which Petitioner filed on October 19, 2017. (ECF No. 48, at 3.) The
23 Second Extension was docketed on October 25, 2017, (ECF No. 40), and then Petitioner filed his
24 Objection to the R&R on December 1, 2017. He then filed a prior motion for review of his Second
25 Extension on December 27, 2017, (ECF No. 45). On January 17, 2018, the Court denied as moot
26 Petitioner's Motions requesting an extension of time to object because he had filed his Objection. The
27 Court explained that his requests were moot because the Objection to the R&R was already filed and
28 further stated that the Court would consider his objections. This Order considers his objections.
Therefore, the Court **DENIES AS MOOT** Petitioner's Motion for Review, (ECF No. 48).

² Petitioner's *ex parte* motion requests the Court rule on his petition for writ of habeas corpus. Because
this Order constitutes the Court's ruling on Petitioner's petition, the Court **GRANTS** Petitioner's Motion,
(ECF No. 50).

³ Pin citations to docketed material refer to the CM/ECF page numbers electronically stamped at the top
of each page.

1 objection, the Court “need only satisfy itself that there is no clear error on the face of the
2 record in order to accept the recommendation.” Fed. R. Civ. P. 72 advisory committee’s
3 note (citing *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974)).

4 ANALYSIS

5 Petitioner filed the present Petition pursuant to 28 U.S.C. § 2254(d). Judge Skomal
6 reviewed each of Petitioner’s arguments, and the Court will do the same. Petitioner has
7 objected to various findings of the R&R; the Court will therefore review *de novo* the
8 portions of the R&R to which Petitioner objects.

9 Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), this Court
10 may grant habeas relief only if the state court’s decision (1) “was contrary to, or involved
11 an unreasonable application of, clearly established federal law, as determined by the
12 Supreme Court . . . ; or (2) resulted in a decision that was based on an unreasonable
13 determination of the facts in light of the evidence presented in the State court proceeding.”
14 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 7–8 (2002).

15 Under § 2254(d)(1), federal law must be “clearly established” in order to support a
16 habeas claim. Clearly established federal law “refers to the holdings, as opposed to the
17 dicta, of [the United States Supreme] Court’s decisions.” *Williams v. Taylor*, 529 U.S. 362,
18 412 (2000). A state court’s decision may be “contrary to” clearly established Supreme
19 Court precedent “if the state court applies a rule that contradicts the governing law set forth
20 in [the Court’s] cases” or “if the state court confronts a set of facts that are materially
21 indistinguishable from a decision of [the] Court and nevertheless arrives at a result different
22 from [the Court’s] precedent.” *Id.* at 406. A state court decision does not have to
23 demonstrate an awareness of clearly established Supreme Court precedent, provided
24 neither the reasoning nor the result of the state court decision contradict such precedent.
25 *Early*, 537 U.S. at 8.

26 A state court decision involves an “unreasonable application” of Supreme Court
27 precedent “if the state court identifies the correct governing legal rule from this Court’s
28 cases but unreasonably applies it to the facts of the particular state prisoner’s case.”

1 *Williams*, 529 U.S. at 407. An unreasonable application may also be found “if the state
2 court either unreasonably extends a legal principle from [Supreme Court] precedent to a
3 new context where it should not apply or unreasonably refuses to extend that principle to a
4 new context where it should apply.” *Id.*; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Clark*
5 *v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003).

6 Relief under the “unreasonable application” clause of § 2254(d) is available “if, and
7 only if, it is so obvious that a clearly established rule applies to a given set of facts that
8 there could be no ‘fairminded disagreement’ on the question.” *White v. Woodall*, 134 S.
9 Ct. 1697, 1706–07 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86 (2011)). An
10 unreasonable application of federal law requires the state court decision to be more than
11 incorrect or erroneous. *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). Instead, the state
12 court’s application must be “objectively unreasonable.” *Id.*; *Miller-El v. Cockrell*, 537 U.S.
13 322, 340 (2003). Even if a petitioner can satisfy § 2254(d), the petitioner must still
14 demonstrate a constitutional violation. *Fry v. Pliler*, 551 U.S. 112, 119–22 (2007). With
15 this general framework in mind, the Court turns to Petitioner’s claims.

16 **I. Claim I: Insufficient Evidence**

17 Petitioner’s first claim is that the evidence adduced at trial was not sufficient to
18 support his conviction for elder abuse. (Petition 20.) Petitioner argues that the evidence
19 failed to show he used the hammer in a manner likely to cause great bodily injury and his
20 father did not suffer a serious injury. (*Id.* at 30.) Petitioner presented this claim to the
21 California Court of Appeal on direct appeal, which affirmed the trial court, (*see* Lodgment
22 No. 6, ECF No. 27-11, at 4–6). He also presented the claim to the California Supreme
23 Court in his petition for review, which was denied without a written opinion. (*See*
24 Lodgment No. 7, ECF No. 27-12; Lodgment No. 8, ECF No. 27-13.) Accordingly,
25 Petitioner properly exhausted his state court remedies before bringing his first claim in
26 federal court.

27 Judge Skomal determined that the California Court of Appeal’s determination that
28 there was sufficient evidence was neither contrary to, nor involved an unreasonable

1 application of, clearly established federal law. (R&R 23 (citations omitted).) Petitioner
2 objects to this finding. Therefore, the Court reviews Petitioner’s claim *de novo*.

3 Petitioner’s claim requires this Court to examine the state court’s reasoning. Where,
4 as here, the higher state court does not provide any reasoning for its decision, federal courts
5 “look through” to the last reasoned state court opinion. Federal habeas courts apply the
6 following presumption: “Where there has been one reasoned state judgment rejecting a
7 federal claim, later unexplained orders upholding that judgment or rejecting the same claim
8 rest upon the same ground.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1194 (2018) (quoting *Ylst*
9 *v. Nunnemaker*, 501 U.S. 797, 803 (1991)). Because the California Supreme Court did not
10 issue a written opinion, the Court assumes it rejected Petitioner’s claim on the same ground
11 as the California Court of Appeal, as long as the earlier opinion “fairly appear[s] to rest
12 primarily upon federal law.” *Id.* (alteration in original) (quoting *Ylst*, 501 U.S. at 803).

13 The California Court of Appeal relied on two cases to supply the requisite holding
14 for Petitioner’s insufficient evidence claim: *People v. Johnson*, 26 Cal. 3d 557, 575–77
15 (1980), and *People v. Bolin*, 18 Cal. 4th 297, 331 (1998), (Lodgment No. 6, at 5). In turn,
16 those cases directly rely on *Jackson v. Virginia*, 443 U.S. 307 (1979), which supplies the
17 federal standard for insufficient evidence. *Jackson* held that a habeas court must ask
18 “whether after viewing the evidence in the light most favorable to the prosecution, any
19 rational trier of fact could have found the essential elements of the crime beyond a
20 reasonable doubt.” *Id.* at 319 (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)); *see*
21 *McDaniel v. Brown*, 558 U.S. 120, 132–33 (2010) (applying *Jackson*). Thus, the California
22 Court of Appeal correctly identified the governing legal rule. The only remaining question
23 is whether the court reasonably applied the precedent to Petitioner’s claim. *See White*, 134
24 S. Ct. at 1706–07.

25 Applying *Jackson* is a two-part process. “First, a reviewing court must consider the
26 evidence presented at trial in the light most favorable to the prosecution.” *United States v.*
27 *Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (quoting *Jackson*, 443 U.S. at 319). This
28 means that when “faced with a record of historical facts that supports conflicting

1 inferences” a reviewing court “must presume—even if it does not affirmatively appear in
2 the record—that the trier of fact resolved any such conflicts in favor of the prosecution,
3 and must defer to that resolution.” *Id.* (quoting *Jackson*, 443 U.S. at 326.) Second, a court
4 must determine whether this evidence is adequate to allow “any rational trier of fact [to
5 find] the essential elements of the crime beyond a reasonable doubt.” *Id.* (alteration in
6 original) (quoting *Jackson*, 443 U.S. at 319). “This second step protects against rare
7 occasions in which ‘a properly instructed jury may . . . convict even when it can be said
8 that no rational trier of fact could find guilt beyond a reasonable doubt[.]’” *Id.* (alterations
9 in original) (quoting *Jackson*, 443 U.S. at 317).

10 The Court applies the two-part *Jackson* standard “with explicit reference to the
11 substantive elements of the criminal offense as defined by state law.” *Davis v. Woodford*,
12 384 F.3d 628, 639 (9th Cir. 2004) (quoting *Jackson*, 443 U.S. at 324 n.16). Petitioner was
13 convicted of elder abuse. (Answer 11.) A defendant is guilty of elder abuse when he
14 “‘knows or reasonably should know that a person is an elder . . . and who, under
15 circumstances or conditions likely to produce great bodily harm or death, willfully causes
16 or permits any elder . . . to suffer, or inflicts thereon unjustifiable physical pain or mental
17 suffering.” *People v. Racy*, 148 Cal. App. 4th 1327, 1332 (Ct. App. 2007) (quoting Cal.
18 Penal Code § 368(b)(1)). The extent of the injury is not determinative and the victim need
19 not be injured at all. *People v. Hopkins*, 78 Cal. App. 3d 316, 320 (Ct. App. 1978).
20 Whether force is likely to produce great bodily harm is a question of fact. *People v. Muir*,
21 244 Cal. App. 2d 598, 604 (Ct. App. 1966).

22 Here, the California Court of Appeal applied the *Jackson* standard as follows:

23 This case illustrates the difference between the role of the
24 original fact finder deciding guilt or innocence and an appellate
25 court reviewing the conviction. Milford’s testimony was
26 problematic and somewhat inconsistent. However, Milford
27 insisted that Foley attempted to hit him in the face with a
28 hammer. [Lodgment No. 8, at 52, 54, 60, 65.] Milford also
maintained that Foley placed his knee on Milford’s neck and

1 choked him until he became unconscious. [Lodgment No. 8, at
2 52-53, 55-56.]

3 A jury could have rejected Milford's testimony, but it did
4 not do so. It is apparent the jury accepted Milford's testimony as
5 true. It is not our role to second guess the jury's credibility
6 decision or to reweigh the evidence. If the jury credited
7 Milford's testimony there is plainly enough evidence to show the
8 use of force likely to cause great bodily injury.

9 Swinging a hammer at a person's face in an effort to hit
10 the person is obviously potentially deadly force. Likewise, using
11 a knee placed against an elderly person's neck to choke the
12 person into unconsciousness poses a grave risk of death or great
13 bodily injury. On this record, it is only fortuitous that the 86-
14 year-old victim was not killed or gravely injured. As we said at
15 the outset of this discussion, there is more than adequate
16 evidence in the record to support the conviction for count 3.

17 (Lodgment No. 6, at 5-6).

18 Judge Skomal details the evidence the jury heard at trial including Milford's
19 testimony that Petitioner "had a God damn knife or a hammer and beat on me" and that
20 Milford "bit him on the left arm" causing Petitioner to drop the hammer. (R&R 21 (quoting
21 Lodgment No. 9, ECF No. 27-14, at 51-53).) Milford also testified that Petitioner "tried
22 to hit me here" and pointed to the right side of his face. (*Id.* at 22 (quoting Lodgment No.
23 9, at 54).) As the Court of Appeal noted, there is some inconsistency in Milford's
24 testimony. For example, he testified that Petitioner broke both locks on the door, but
25 Officer Weber testified that he had to kick in the locked bedroom door. Indeed, Petitioner
26 raises this point in his objections to the R&R. (R&R Obj. 41.)

27 *Jackson's* first step requires the Court to view the facts in a light most favorable to
28 the prosecution. Thus, the Court assumes that any ambiguity in Milford's testimony was
resolved in the mind of the factfinder in favor of the prosecution. The second step requires
the Court to determine whether this evidence, properly construed, would allow any rational
trier of fact to find the essential elements of the crime beyond a reasonable doubt. Here,
the circumstances likely to produce great harm or death were Petitioner swinging the
hammer and pinning Milford to the floor with his knee. Petitioner need not have actually

1 injured Milford, *see Hopkins*, 78 Cal. App. 3d at 320; the jury could have believed that
2 Petitioner caused mental suffering to Milford. *See* Cal. Penal Code § 368(b)(1). The Court
3 finds the California Court of Appeal reasonably applied *Jackson*.

4 Petitioner's objections do not counsel a different result. At the outset, the Court
5 notes that many of Petitioner's objections as to his first claim speak to alleged ineffective
6 assistance of counsel on the part of his trial and appellate counsel. (*See* R&R Obj. 35–40.)
7 The Court addresses those objections below in Petitioner's Ineffective Assistance of
8 Counsel claim. *See infra* section VIII.A. As discussed, Petitioner objects to the testimony
9 that he broke locks to bathroom: "No where [sic] in a police report or in testimony does it
10 state, petitioner broke the locked doors and hit (Milford) with the hammer, and then stabbed
11 him with a knife, also he was not covered with blood." (R&R Obj. 40–41.) Instead, he
12 contends that police report states that officers were the ones who broke the locked doors
13 and the police found Milford sitting on the bed. (*Id.* at 41.) This discrepancy in Milford's
14 testimony with the police report does not overcome the deference owed to the finder of
15 fact—the jury. The jury believed Milford's testimony, despite the discrepancy, and this
16 Court does not disturb their finding because a rational trier of fact could have found the
17 essential elements for elder abuse.

18 Next, Petitioner states that he has provided documents that were withheld from court,
19 showing that law enforcement modified evidence. (*Id.*) For example, there is a radiology
20 report showing that the bullet he was shot with was still in his body, which contradicts the
21 police statement that the bullet went through his body. (*Id.*) There are several defects in
22 this argument. First, if the Court were to accept Petitioner's argument about his bullet
23 wounds, this has nothing to do with his aggression towards his father resulting in elder
24 abuse. Second, even assuming the police fabricated evidence, the jury could have relied
25 exclusively on Milford's testimony—not the supposedly fabricated police evidence—to
26 find all the elements of elder abuse beyond a reasonable doubt.

27 Petitioner argues that his constitutional rights were violated, that he presented facts
28 in his Traverse demonstrating his rights were violated, and cites *DiBenedetto v. Hall*, 272

1 F.3d 1 (1st Cir. 2001), to that effect. (R&R Obj. 41.) Petitioner’s argument here is not
2 entirely clear, but the Court assumes that Petitioner is referring to his argument in his
3 Traverse where he states that the prosecution presented evidence at trial that was obtained
4 by illegal means and should be excluded. (*See* Traverse 10.) It appears Petitioner renews
5 this argument in his objections because he argues he meets the *Jackson* standard. He
6 further contends all law enforcement’s evidence was tainted and should be considered
7 “Fruit of the Poisonous Tree.” (R&R Obj. 42.) The Court addresses Petitioner’s arguments
8 concerning supposedly illegally obtained evidence below. *See infra* section IV.

9 Petitioner presents no further objection as to Judge Skomal’s findings on the first
10 claim and the Court agrees with Judge Skoma’. Accordingly, the Court **OVERRULES**
11 Petitioner’s Objections and **ADOPTS** Judge Skomal’s R&R as to claim one.

12 **II. Exhaustion of Remaining Claims**

13 Respondent states that Petitioner’s remaining claims were presented for the first time
14 to the California Supreme Court and were not presented to the California Court of Appeal.
15 (Answer 13.) As such, Petitioner’s remaining claims are unexhausted and a federal habeas
16 court generally cannot hear unexhausted claims. 28 U.S.C. § 2254(b)(1)(A); *Castille v.*
17 *Peoples*, 489 U.S. 346, 349 (1989). “28 U.S.C. § 2254 requires a federal habeas petitioner
18 to provide the state courts with a ‘fair opportunity’ to apply controlling legal principles to
19 the facts bearing upon his constitutional claim.” *Anderson v. Harless*, 459 U.S. 4, 6 (1982)
20 (per curiam) (quoting *Picard v. Connor*, 404 U.S. 270, 276–77 (1971)). The Supreme
21 Court has held “that a claim remains unexhausted for lack of ‘fair presentation’ where, as
22 here, it was raised for the first time on discretionary review to the state’s highest court and
23 denied without comment. *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004) (citing
24 *Castille*, 489 U.S. at 351).

25 Judge Skomal determined there are two reasons this Court may hear Petitioner’s
26 unexhausted claims on the merits. First, he reasoned that § 2254(b)(2) allows district courts
27 to deny an application on the merits even if Petitioner’s claims are unexhausted. (R&R
28 25.) Second, he found that Petitioner’s claims would be procedurally barred under

1 California law if he returned to California state court and the Court may reach the merits
2 of a procedurally defaulted claim. (*See id.* at 25–26.)

3 28 U.S.C. § 2254(b)(2) provides that “[a]n application for a writ of habeas corpus
4 may be denied on the merits, notwithstanding the failure of the applicant to exhaust the
5 remedies available in the courts of the State.” *See also Berghuis v. Thompson*, 560 U.S.
6 370, 390 (2010) (“Courts can, however, deny writs of habeas corpus under § 2254 by
7 engaging in *de novo* review when it is unclear whether AEDPA deference applies, because
8 a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is
9 rejected on *de novo* review.” (citing § 2254(a)). The Ninth Circuit has held that “a federal
10 court may deny an unexhausted petition on the merits only when it is perfectly clear that
11 the applicant does not raise even a colorable federal claim.” *Cassett v. Stewart*, 406 F.3d
12 614, 623–24 (9th Cir. 2005); *see Granberry v. Greer*, 481 U.S. 129, 135 (1987).

13 The Court agrees with Judge Skomal that it may hear Petitioner’s second through
14 seventh claim on the merits as long as the claims do not raise a colorable federal claim
15 under *de novo* review. Respondent likewise requests Petitioner’s remaining claims be
16 examined on the merits. (Answer 14.) Because the Court reviews Petitioner’s unexhausted
17 claims *de novo*, it need not reach Judge Skomal’s procedural default finding.

18 **III. Claim Two: Exclusion of Testimony**

19 Petitioner’s second claim is that the trial court erred in excluding his mother
20 Beverly’s testimony at trial. (R&R 27–28 (citing Petition 20, 26, 28–29).) Defense counsel
21 filed a pre-trial motion requesting an evidentiary hearing concerning Beverly’s competency
22 to testify at trial. (*Id.* at 28 (citing Lodgment No. 1, Clerk’s Transcript (“CT”), ECF No.
23 27-1, at 25).) The trial court granted the hearing, pursuant to California Evidence Code
24 §§ 402 and 701, because Beverly suffered from dementia and had difficulty recalling any
25 of the events of the alleged incident. (*Id.* (citing Lodgment No. 3, Reporter’s Appeal
26
27
28

1 Transcript (“RT”), ECF Nos. 27-3 to 27-8, at 4).⁴ At the evidentiary hearing, Beverly
2 repeatedly asked “why are we here” and “what’s this all about.” (*Id.* (citing RT 41–42,
3 44).) She did not remember being injured at the time of the incident and did not remember
4 the police coming to her home. (*Id.* (citing RT 42).) The trial court made a specific finding
5 that Beverly no longer had personal knowledge of the events in question and limited her
6 testimony to identifying that Petitioner was her son. (*Id.* at 29 (citing RT 47–49).)

7 Petitioner contends that select portions of Beverly’s evidentiary hearing demonstrate
8 that she was competent to testify and the jury should have weighed her credibility. (Petition
9 28.) Respondent contends that the trial court’s competency determination is a matter of
10 state law and does not raise a cognizable federal question. (Answer 14.) Accordingly,
11 federal habeas courts cannot grant a petition solely for errors in state law. (*Id.* (citing, e.g.,
12 *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam)).) Petitioner counters that the
13 decision to exclude his mother’s testimony violated his federal right to due process and to
14 present a defense, guaranteed under the Sixth and Fourteenth Amendments. (Traverse 29–
15 34.)

16 This issue involves two competing interests. As Respondent correctly points out, “it
17 is not the province of a federal habeas court to reexamine state court determinations on
18 state law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). A federal court
19 should only consider a perceived error of state law where the error amounts to a violation
20 of due process or equal protection clauses of the Fourteenth Amendment. *See id.* at 68
21 (examining whether admission of evidence under California law violated the petitioner’s
22 federal constitutional rights). A defendant’s due process right includes “a meaningful
23 opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).
24 This includes presenting witnesses in one’s own defense. *See Chambers v. Mississippi*,
25 410 U.S. 284, 302 (1973).

26
27 ⁴ The Reporter’s Appeal Transcript (Lodgment No. 3) is lodged at ECF Nos. 27-3 to 27-8. While the
28 Court generally refers to pin cites electronically stamped by the CM/ECF system, the Court will refer to
the original page numbers in the Reporter’s Appeal Transcript when citing to Lodgment No. 3.

1 “[S]tate and federal rulemakers have broad latitude under the Constitution to
2 establish rules excluding evidence from criminal trials.” *Holmes v. South Carolina*, 547
3 U.S. 319, 324 (2006) (alteration in original) (quoting *United States v. Scheffer*, 523 U.S.
4 303, 308 (1998)). This right is not unlimited—evidence rules cannot “infring[e] upon a
5 weighty interest of the accused and are arbitrary or disproportionate to the purposes they
6 are designed to serve.” *Id.* The *Holmes* court provided several examples of arbitrary rules
7 of evidence including a state statute that “barred a person who had been charged as a
8 participant in a crime from testifying in defense of another alleged participant unless the
9 witness had been acquitted.” *Id.* at 325 (citing *Washington v. Texas*, 388 U.S. 14, 22–23
10 (1967)). Conversely, well-established rules of evidence permit judges to “exclude
11 evidence if its probative value is outweighed by certain other factors such as unfair
12 prejudice, confusion of issues, or potential to mislead the jury.” *Id.* at 326 (citations
13 omitted); *see also id.* at 326–27 (permitting judges “to exclude evidence that is
14 ‘repetitive . . . , only marginally relevant’ or poses an undue risk of ‘harassment, prejudice,
15 [or] confusion of the issues’” (alterations in original) (quoting *Crane*, 476 U.S. at 689–
16 90)).

17 Judge Skomal determined that Petitioner did not establish constitutional error in the
18 trial court’s exclusion of Beverly’s testimony. (R&R 31.) Petitioner argued the trial court
19 violated California Evidence Code § 780, which provides that “[e]xcept as otherwise
20 provided by statute, the court or jury may consider in determining the credibility of a
21 witness any matter that has a tendency in reason to prove or disprove the truthfulness of
22 his testimony.” As Judge Skomal points out, § 780 clearly references other statutory
23 sections and Evidence Code § 702 requires a witness to have personal knowledge of the
24 matter. (R&R 31.) Thus, § 702 is an exception to § 780. The trial court judge relied on
25 § 702 to consider various evidence tending to show that Beverly did not have the capacity
26 remember the events of September 1, 2013. (*See id.*) Judge Skomal concluded that
27 California’s evidentiary rules are not arbitrary. (*Id.* at 32 (citing *Scheffer*, 523 U.S. at 308;
28 *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).)

1 Petitioner’s objections to the R&R cite several cases where courts permitted a
2 witness to testify despite potential issues with the witness. (R&R Obj. 43.) First, Petitioner
3 cites *People v. McCaughan*, 49 Cal. 2d 409 (1957), for the proposition that when a witness
4 gives different answers than previous testimony that witness may not be disqualified.
5 (R&R Obj. 43.) *McCaughan* did state that a “witness’s competency depends on his ability
6 to perceive, recollect, and communicate. Whether he did perceive accurately, does
7 recollect, and is communicating accurately and truthfully are questions of credibility to be
8 resolved by the trier of fact.” 49 Cal. 2d at 420 (citation omitted). The quoted language
9 appears to support Petitioner’s assertion; however, *McCaughan* also made clear that “a
10 challenged witness’s capacities to perceive, recollect, and communicate truthfully were all
11 preliminary facts to be determined exclusively by the court in the exercise of its sound
12 discretion.” *People v. Anderson*, 25 Cal. 4th 543, 572 (2001) (citing *McCaughan*, 49 Cal.
13 2d at 421).

14 Further, the Evidence Code was amended in 1965, after *McCaughan*, and modified
15 the testimonial competence framework. *See id.* Under the current framework, a person is
16 disqualified as a witness only if he or she is “[i]ncapable of *expressing* himself or herself
17 [understandably] concerning the [testimonial] matter” or is “[i]ncapable of *understanding*
18 *the duty of a witness to tell the truth.*” *Id.* at 572–73 (alterations in original) (citing Cal.
19 Evid. Code § 701). The California Supreme Court reiterated that the capacity to
20 communicate or understand the duty to tell the truth is a preliminary fact to be determined
21 exclusively by the court and the determination will be upheld in the absence of a clear
22 abuse of discretion. *Id.* at 573 (citing Cal. Evid. Code § 405). Here, the trial court did not
23 determine that Beverly could not testify because her answers changed from prior testimony,
24 as Petitioner seems to suggest in his objections. The trial court determined she no longer
25 had personal knowledge of the incident in question, as evidenced by her dementia and
26 inability to understand what was going on during the evidentiary hearing. Such a
27 determination was well within the discretion of the trial court under the testimonial
28 competency framework.

1 Second, Petitioner cites *People v. Blagg*, 10 Cal. App. 3d 1035 (Ct. App. 1970), to
2 support his contention that “even if a witness has mental issues, that include fantasies, it
3 does not effect ones [sic] ability to communicate.” (R&R Obj. 43.) In *Blagg*, a victim was
4 confined with the defendant in a county jail and suffered assault at the hands of the
5 defendant. 10 Cal. App. 3d at 1038. The victim suffered from mental issues and the court
6 conducted a competency hearing, as required by Evidence Code §§ 701 and 403. *Id.* at
7 1039. The trial court determined that the witness was “able to give information concerning
8 his prior offenses in an intelligible manner,” a doctor opined that the witness’s mental
9 condition did not affect his ability to communicate or distinguish between truth and falsity,
10 and the victim exhibited an understanding of his obligation to tell the truth. *Id.* at 1039–
11 40. The trial court found the witness competent and the Court of Appeal affirmed because
12 the competency decision lay within the trial court’s discretion. *Id.* at 1040.

13 Here, the facts are distinguishable from *Blagg*. Beverly could not understand basic
14 questions at her evidentiary hearing and repeatedly asked “why are we here” and “what’s
15 this all about.” (RT 23–24, 26.) She did not remember being injured at the time of the
16 incident and did not remember the police coming to her home. Her son Christopher
17 testified that Beverly’s condition had deteriorated to the point where she had to live in a
18 secure dementia and Alzheimer’s ward. (*Id.* at 75.) Beverly did not know she lived in a
19 secure dementia facility or that she had been diagnosed with dementia. (*Id.* at 37.) Finally,
20 Beverly’s treating physician testified that Beverly suffered a concussion on September 1,
21 2013, which exacerbated her dementia. (*Id.* at 340–41.) Unlike the witness in *Blagg*, there
22 is ample evidence for the trial court to determine that Beverly had no personal knowledge
23 of the incident. Moreover, *Blagg*, *McCaughan*, and *Anderson* all teach that the decision to
24 permit a witness to testify is committed to the sound discretion of the trial court.⁵

25
26 ⁵ Petitioner also cites *United States v. Peyro*, 786 F.2d 826 (8th Cir. 1986). (R&R Obj. 43.) This case
27 also holds that witness competency decisions are a matter of discretion for the trial court. 786 F.2d at
28 830–31 (citation omitted). There, the trial court determined that while a witness could not recall detail,
“she ha[d] a broad, general recollection” and permitted her to testify. *Id.* at 831. The trial court in
Petitioner’s case determined that Beverly did not have *any* recollection of the critical events.

1 Accordingly, the evidence supports the trial court's decision to disallow Beverly's
2 testimony.

3 Judge Skomal also found that even if the trial court committed error, the error was
4 harmless. (R&R 32–33.) Judge Skomal determined that Petitioner has not demonstrated
5 that Beverly's testimony was necessary for a meaningful defense or even that she was a
6 favorable witness for the defense. (*Id.* at 33.) Indeed, as Judge Skomal points out the jury
7 heard Beverly's voice on a 911 recording saying Petitioner is "acting up and threatening as
8 usual," that "I've been attacked . . . by my son," that Petitioner "had a knife," and that "I
9 am bleeding to death." (*Id.* (quoting Lodgment No. 2, ECF No. 27-2, at 12, 15–16).)
10 Officer Cosby testified that he asked Beverly how she had been injured and she replied,
11 "[m]y son did it with his hands and fists." (*Id.* (quoting RT 171).)

12 In his objections, Petitioner raises a variety of errors purportedly amounting to actual
13 prejudice. For example, Petitioner states that his defense attorney was supposed to show a
14 psychiatrist evaluated Beverly before the evidentiary hearing. (R&R Obj. 44.) Or, a
15 witness at the evidentiary hearing, Dr. Tomanenh, did not personally examine Beverly
16 before opining as to her condition. (*Id.* at 45.) However, these purported errors only speak
17 to the trial court's decision to exclude Beverly's testimony. The harmless error analysis
18 assumes that even if the trial court's decision was erroneous then such an error did not
19 result in a substantial and injurious effect or influence in determining the jury's verdict.
20 *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citing *Kotteakos v. United States*, 328
21 U.S. 750, 775 (1946)). Petitioner's objections do not illustrate how, assuming Beverly
22 testified, the jury's verdict would be different.

23 Petitioner also contends that his mother was answering coherently at trial and his
24 defense counsel erred by asking for a competency hearing. (R&R Obj. 46.) The Court
25 discusses allegations of ineffective assistance of counsel later in this Order. *See infra*
26 section VIII.A. Petitioner argues that the R&R engages in speculation as to how Beverly
27 would have testified at trial. (*Id.* at 47.) He asserts that "[b]y the witness stating in
28 testimony that the petitioner did not strike her, any reasonably [sic] juror, would of

1 concluded, this to be true.” (*Id.*) At her competency hearing conducted outside the
2 presence of the jury, Beverly was asked “Do you remember if Greg ever hurt Milford or
3 you physically?” (RT 31.) She responded in the negative. (*Id.*) However, Beverly also
4 testified that she could not remember whether the police or paramedics visited her home in
5 September 2013. (*Id.* at 42.) Furthermore, Judge Skomal lays out several pieces of
6 evidence that directly contradict Beverly’s statement in the competency hearing that her
7 son did not harm her or her husband. (*See* R&R 33.) For example, Beverly’s 911 call
8 discloses that she told the 911 dispatcher that she was attacked by her son. (Lodgment No.
9 2, at 15.) Officer Cosby testified that at the crime scene Beverly told him, “[m]y son did
10 it with his hands and fists.” (RT 171.) A doctor testified that the knife wounds sustained
11 by Beverly were defensive. (*Id.* at 383.) In sum, Petitioner can cite one colloquy between
12 Beverly and Petitioner’s attorney that could affect or influence the jury’s verdict. Yet, the
13 weight of the remaining evidence concerning Beverly’s testimony demonstrates that even
14 if the trial court erred by precluding Beverly from testifying at trial the error was harmless.

15 Therefore, the Court **OVERRULES** Petitioner’s objections and **ADOPTS** Judge
16 Skomal’s R&R as to claim two.

17 **IV. Claim Three: Evidence Suppression**

18 Petitioner’s third claim is that the hammer he was convicted of abusing his father
19 with was illegally seized because his sister, brother, and his brother’s girlfriend found the
20 hammer while trespassing the bedroom where the incident took place. (R&R 34 (citing
21 Petition 20, 26, 30–32).) Respondent contends that even if Petitioner’s sister, brother, and
22 brother’s girlfriend were trespassing then Petitioner’s federal rights were not violated
23 because the actions could not be attributed to law enforcement. (Answer 15.)

24 Judge Skomal cites *Stone v. Powell*, 428 U.S. 465, 494 (1976), for the proposition
25 that “where the State has provided an opportunity for full and fair litigation of a Fourth
26 Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the
27 ground that evidence obtained in an unconstitutional search or seizure was introduced at
28 his trial.” (R&R 34.) California law provides such an opportunity. *See* Cal. Penal Code

1 § 1538.5. Moreover, the Ninth Circuit has held that a habeas petitioner need not actually
2 avail himself Penal Code § 1538.5 for a court to determine that the petitioner has a “full
3 and fair litigation” of his Fourth Amendment claim. *Gordon v. Duran*, 895 F.2d 610, 613–
4 14 (9th Cir. 1990) (citing *Stone*, 428 U.S. at 481–82). Here, California Penal Code § 1538.5
5 provided Petitioner with the opportunity to suppress the supposedly illegally seized
6 hammer. Judge Skomal recommends denying Petitioner’s third claim. (R&R 35.)

7 Petitioner’s objects to Judge Skomal’s conclusions by raising an ineffective
8 assistance of counsel claim and argues, for the first time, that his attorney should have
9 suppressed the hammer before trial. (R&R Obj. 50.) The Court addresses Petitioner’s
10 ineffective assistance of counsel claims below. *See infra* section VIII.A. Petitioner also
11 argues that the person who found the evidence in question must file a police report and
12 testify to qualify the report. (R&R Obj. 50 (citing *United States v. Dotson*, 821 F.2d 1034
13 (5th Cir. 1987)).) Petitioner then discusses how his rights were harmed by introduction of
14 the hammer at trial. (*See id.*) Petitioner offers several additional reasons why the evidence
15 should have been excluded. For example, “[a] private citizen obtaining evidence by an
16 illegal seizer, and informing the officer as to how it was obtained, the evidence is
17 inadmissible to be presented in an [sic] criminal trial.” (*Id.* at 52 (citing *Nardone v. United*
18 *States*, 308 U.S. 338, 341 (1939); and *United States v. Paroutian*, 299 F.2d 486 (2d Cir.
19 1962)). Or, “when the private citizen entered the property of the petitioner without his
20 permission and states he allegely [sic] found evidence, is fruit of a [sic] illegal search
21 thereby the evidence was obtained by, “Exploitation of Illegality.” (*Id.* (citing *Wong Sun*
22 *v. United States*, 371 U.S. 471 (1963); and *United States v. Hernandez*, 279 F.3d 302 (5th
23 Cir. 2002)).) Petitioner cites several more cases for the proposition that illegally seized
24 evidence should be suppressed under the exclusionary rule. (*See id.* at 52, 54.)

25 All of Petitioner’s objections miss Judge Skomal’s critical insight: “where the State
26 has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a
27 state prisoner may not be granted federal habeas corpus relief on the ground that evidence
28 obtained in an unconstitutional search or seizure was introduced at his trial.” *Stone*, 428

1 U.S. at 494 (footnotes omitted). Petitioner’s arguments could have been raised in an effort
2 to suppress illegally obtained evidence pursuant to California Penal Code § 1538.5.
3 Whether or not they were actually raised does not matter for a federal habeas petition—the
4 State afforded Petitioner the opportunity to litigate his Fourth Amendment claims.

5 Accordingly, the Court **OVERRULES** Petitioner’s Objections and **ADOPTS** Judge
6 Skomal’s R&R as to Petitioner’s third claim.

7 **V. Claim Four: False Testimony**

8 Petitioner’s fourth claim is that his brother, Christopher, falsely testified at trial
9 because: (1) Christopher testified he was present when the hammer was found despite a
10 police report stating he said he was downstairs when the hammer was found; (2) an object
11 the size of the hammer could not have been missed in the police search; and (3) Christopher
12 was antagonistic to Petitioner because he wished to prevent Petitioner from inheriting from
13 their parents’ estate. (R&R 35 (citing Petition 21, 26, 37, 41, 56).) Respondent concedes
14 that there may have been inconsistent statements by Christopher, but contends “[t]he fact
15 that a witness may have made an earlier inconsistent statement, or that other witnesses have
16 conflicting recollections of events, does not establish that the testimony offered at trial was
17 false.” (Answer 16 (alteration in original) (quoting *United States v. Croft*, 124 F.3d 1109,
18 1119 (9th Cir. 1997)).)

19 Judge Skomal states that Christopher did not contradict his statement to police that
20 he was not present when the hammer was found. (R&R 35–36.) Instead, as Judge Skomal
21 explains, Christopher was shown a photograph of Petitioner’s bed and asked if that was
22 where the hammer was found. (*Id.* at 36.) Christopher testified, “I believe that’s where it
23 was found. I myself did not personally find it. I had so much going on. I believe Gina
24 [Christopher’s girlfriend] found it, and she immediately yelled for me.” (*Id.* (quoting RT
25 80).) Judge Skomal concludes that Petitioner has not established that Christopher actually
26 testified falsely or inconsistently and, therefore, Petitioner has failed to demonstrate that
27 introduction of Christopher’s testimony regarding the hammer was so prejudicial as to
28

1 render his trial fundamentally unfair. (*Id.* (citing *Ortiz-Sandoval v. Gomez*, 81 F.3d 891,
2 897 (9th Cir. 1996)).)

3 Petitioner contends that the discrepancies in Christopher’s testimony were not minor
4 and that Christopher had to “make exact statements without the probability of even a minor
5 disceptency [sic].” (R&R Obj. 55.) For example, Petitioner contends that Christopher
6 initially stated that he immediately turned the evidence over to the police and then later
7 changed his testimony that he turned the hammer over the next day. (*Id.*)

8 At trial when asked whether he gave the hammer that Gina found to the police,
9 Christopher responded “immediately.” (RT 79.) On cross examination, he testified that
10 the hammer “was turned over the same day because police were coming in and out
11 constantly.” (*Id.* at 101.) The police report that Petitioner includes in his R&R Objections
12 also states that the police received the hammer during day of September 1, 2013, consistent
13 with Christopher’s testimony. (R&R Obj. 16.) Petitioner has not identified where the
14 supposed discrepancy in testimony exists.

15 Even if Christopher’s testimony contained minor inconsistent statements, such an
16 issue is not dispositive. As Respondent points out, “[t]he fact that a witness may have
17 made an earlier inconsistent statement, or that other witnesses have conflicting
18 recollections of events, does not establish that the testimony offered at trial was false.”
19 *Croft*, 124 F.3d at 1119. (*See Answer 16.*) Therefore, Petitioner’s contention that
20 Christopher had to make statements without the possibility of minor discrepancies is not
21 supported by law. And, Petitioner has not established Christopher actually made
22 conflicting statements.

23 Next, Judge Skomal examined whether Christopher’s testimony about how Gina
24 found the hammer deprived Petitioner of his right to confront Gina, the person who found
25 the evidence.⁶ As Judge Skomal states, “[t]he Confrontation Clause does not apply to non-
26 testimonial evidence.” (R&R 36 (citing *Davis v. Washington*, 547 U.S. 813, 821 (2006)).)

27
28 ⁶ Gina did not testify at trial.

1 Testimonial evidence includes statements that are the functional equivalent of court
2 testimony, such as affidavits, depositions, confessions, or “statements that were made
3 under circumstances which would lead an objective witness reasonably to believe that the
4 statement would be available to use at a later trial.” (*Id.* (quoting *Crawford v. Washington*,
5 541 U.S. 36, 51–52 (2004)).) Judge Skomal concludes that Gina’s statement made when
6 she found the hammer in Petitioner’s bedroom was not testimonial and therefore
7 Petitioner’s Sixth Amendment right was not violated. (*Id.* at 37.) Judge Skomal also finds
8 that even if Petitioner’s Sixth Amendment right was violated, such an error was harmless
9 because Petitioner has not demonstrated the manner in which the hammer was found had
10 a substantial or injurious effect on the jury’s verdict. (*Id.* (citing *Brecht*, 507 U.S. at 623).)

11 In response, Petitioner argues that “[t]he individual who found the evidence must be
12 the one testifying, to dispell [sic] any possibility of error.” (R&R Obj. 55 (citing *United*
13 *States v. Bernes*, 602 F.2d 716 (5th Cir. 1979)).) Petitioner contends that even if “the
14 evidence” met an exception to the rule against hearsay evidence then state law excludes
15 hearsay evidence because it prejudiced him under Evidence Code § 353. (*Id.* at 55–56.)
16 He further contends that he was prejudiced because the person who found the hammer,
17 Gina, did not testify. (*Id.* at 56 (citing *United States v. Summers*, 566 F.3d 192 (4th Cir.
18 2011); and *Dias v. State*, 95 Nev. 710 (1979) (per curiam)).)

19 The Sixth Amendment requires “[i]n all criminal prosecutions, the accused shall
20 enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend
21 VI. *Washington v. Crawford* held that the Amendment guarantees a defendant’s right to
22 confront those “who ‘bear testimony’” against him. 541 U.S. at 51. The Supreme Court
23 went on to explain what constitutes testimonial statements, which this Court quotes at
24 length:

25 Various formulations of this core class of testimonial statements
26 exist: *ex parte* in-court testimony or its functional equivalent—
27 that is, material such as affidavits, custodial examinations, prior
28 testimony that the defendant was unable to cross-examine, or
similar pretrial statements that declarants would reasonably

1 expect to be used prosecutorially; extrajudicial statements . . .
2 contained in formalized testimonial materials, such as affidavits,
3 depositions, prior testimony, or confessions; statements that were
4 made under circumstances which would lead an objective
5 witness reasonably to believe that the statement would be
6 available for use at a later trial.

7 *Id.* at 51–52 (internal quotations marks and citations omitted).

8 Here, Gina found the hammer introduced against Petitioner and he was unable to
9 confront Gina before trial. The only remaining inquiry is whether Gina’s evidence
10 constitutes a “testimonial statement.” Critically, Gina’s discovery of the hammer was not
11 a statement, but rather an action. She found the hammer; any statements she made were
12 incidental to the act of finding the evidence. Even if the Court were to construe the event
13 in question as a statement, Gina’s statements were not testimonial. Christopher testified
14 that Gina and his sister were cleaning up the blood in his parents’ bedroom. (RT 79.) He
15 stated, “I myself did not personally find [the hammer]. I had so much going on. I believe
16 Gina found it, and she immediately yelled for me.” (*Id.* at 80.) Gina was cleaning the
17 bedroom, not conducting an investigation. There was no indication that she expected to
18 find anything for use at trial; indeed, as Petitioner points out, the police did not find the
19 hammer during their initial search. Therefore, Gina did not give a pretrial statement that
20 she expected would be used prosecutorially. Without a testimonial statement there can be
21 no Sixth Amendment violation.

22 Judge Skomal also concluded that even if Petitioner’s Sixth Amendment right was
23 violated, such violation amounted to harmless error. (R&R 37.) Judge Skomal reasoned
24 that Petitioner has not demonstrated how any error in the hammer’s chain of custody had
25 any impact on the outcome of the trial. (*Id.*) Petitioner objects stating that combining the
26 problematic testimony with the illegally seized evidence would mean that a reasonable
27 jurist would conclude the testimony had substantial merit and would be believed. (R&R
28 Obj. 58.)

1 Petitioner’s burden to show a trial court error resulted in actual prejudice is
2 substantial. Under *Brecht*, “relief is proper only if the federal court has ‘grave doubt about
3 whether a trial error of federal law had substantial and injurious effect or influence in
4 determining the jury’s verdict.’” *Davis v. Ayala*, 135 S. Ct. 2187, 2197–98 (2015) (internal
5 quotation marks omitted) (quoting *O’Neal v. McAninch*, 513 U.S. 431, 436 (1995)).
6 Petitioner does not explain how the way in which the hammer was discovered created a
7 substantial and injurious effect. Instead, he concludes that the mere existence of the defect,
8 combined with “illegally seized evidence,” (R&R Obj. 58), would sway a jury. Without
9 further explanation, the Court cannot credit Petitioner’s conclusory statements. Moreover,
10 the jury had ample testimony concerning the discovery of the hammer even if there was a
11 defect in how it was handled after the discovery. The Court finds that any error was
12 harmless.

13 In sum, the Court **OVERRULES** Petitioner’s Objections and **ADOPTS** Judge
14 Skomal’s R&R as to Petitioner’s fourth claim.

15 **VI. Claim Five: Excessive Force and Law Enforcement Perjury**

16 Petitioner’s fifth claim is that the police used excessive force during his arrest and
17 committed perjury at trial; therefore, their testimony and crime scene evidence should have
18 been excluded as “fruit of the poisonous tree.” (R&R 37 (citing Petition 21–22, 27, 42–
19 47, 58).) Petitioner claims that police used excessive force because they shot Petitioner at
20 point-blank range with a rifle after he surrendered in his parents’ bedroom. (*Id.*) Petitioner
21 further contends that the police lied about shooting him with a rifle because an AR-15 rifle
22 fires a .223 caliber round, but Petitioner’s treating physician removed a 9-millimeter bullet
23 from his body the night of the incident. (*Id.*)

24 The first issue here is sufficiency of evidence under *Jackson*. Specifically, the Court
25 must resolve whether Petitioner could be convicted of resisting an officer if the officers
26 used excessive force against Petitioner. The jury received an instruction that an arrest in
27 unlawful “when force is unreasonable or excessive.” (*Id.* at 38 (quoting RT 560).) Judge
28 Skomal details the evidence that the jury heard at trial as to the reasonableness of force,

1 including testimony that the officers used 40-millimeter non-lethal rubber rounds on
2 Petitioner to no effect. (*See id.* at 38–39.) Judge Skomal further states that the jury heard
3 that Petitioner did not have an exit wound and bullet fragments remained in Petitioner’s
4 body. (*Id.* at 38.) Consistent with the testimony from multiple police officers at the scene
5 when the round was fired, bullet fragments were found at the top of the stairs where the
6 police state Petitioner was standing. (*Id.*) There were no bullet fragments in the bedroom
7 nor was there an exit wound, both of which would have occurred had Petitioner been shot
8 at point-blank range as he contends. (*Id.*) Judge Skomal applies the *Jackson* standard and
9 concludes that there was sufficient evidence to support a verdict that Petitioner was guilty
10 of resisting lawful arrest. (*Id.* at 39.) Judge Skomal also notes that the Court must defer to
11 the jury’s findings on witness credibility. (*Id.* at 40.)

12 Petitioner responds that his claim is that an officer shot him at point-blank range
13 with a 9-millimeter service weapon and the officer perjured himself to cover up that fact.
14 (R&R Obj. 59.) Petitioner then goes on to state that the evidence demonstrating that the
15 police manufactured a crime scene to cover up their wrongdoings was not presented at trial.
16 (*Id.* at 58–59.) And, his attorney failed to challenge the evidence presented by the
17 prosecution. (*Id.* at 59.) Petitioner also contends that his counsel failed to challenge the
18 police officers on the excessive force issue. (*Id.*) Petitioner reiterates that the police failed
19 to protect him and used excessive force against him. (*Id.* (citing, e.g., *Fletcher v.*
20 *O’Donnell*, 867 F.2d 791 (3d Cir. 1989)).)

21 The Court applies the two-part *Jackson* standard. “First, a reviewing court must
22 consider the evidence presented at trial in the light most favorable to the prosecution.”
23 *Nevils*, 598 F.3d at 1164 (quoting *Jackson*, 443 U.S. at 319). Second, a court must
24 determine whether this evidence is adequate to allow “any rational trier of fact [to find] the
25 essential elements of the crime beyond a reasonable doubt.” *Id.* (alteration in original)
26 (quoting *Jackson*, 443 U.S. at 319). The Court applies the two-part *Jackson* standard “with
27 explicit reference to the substantive elements of the criminal offense as defined by state
28 law.” *Davis*, 384 F.3d at 639 (quoting *Jackson*, 443 U.S. at 324 n.16).

1 Petitioner was charged with one count of violating California Penal Code § 69,
2 which prohibits a person from deterring or preventing a law enforcement officer from
3 performing their duty or knowingly resisting the officer. “The statute sets forth two
4 separate ways in which an offense can be committed. The first is attempting by threats or
5 violence to deter or prevent an officer from performing a duty imposed by law; the second
6 is resisting by force or violence an officer in the performance of his or her duty.” *People*
7 *v. Bernal*, 222 Cal. App. 4th 512, 517 (Ct. App. 2013) (emphasis omitted) (quoting *In re*
8 *Manuel G.*, 16 Cal. 4th 805, 814 (1997)). However, it is axiomatic that an officer who uses
9 excessive force renders it impossible for the arrestee to resist a police officer in
10 performance of his duty. *See People v. Olguin*, 119 Cal. App. 3d 39, 44–45 (Ct. App.
11 1981) (collecting cases). Put differently, excessive force negates a resisting arrest charge.

12 The Court agrees with Judge Skomal that the evidence, viewed in the light most
13 favorable to the prosecution, is sufficient to allow a rational trier of fact to find Petitioner
14 violated Penal Code § 69. The corollary finding is that the officers did not use excessive
15 force on Petitioner. The evidence established that Petitioner had a blood alcohol level of
16 .23 percent the night of the incident. The police fired several non-lethal rounds and struck
17 Petitioner to no effect. (RT 268.) The police officers testified that Officer Kaldenbach
18 shot Petitioner with an AR-15 rifle as he turned with a knife towards his father Milford.
19 (*Id.* at 269–70, 281–82.) Petitioner’s theory that he was shot after he was disarmed is not
20 supported by the evidence. The bullet fragments recovered from the scene were found at
21 the top of the stairs and not in the bedroom. Had Petitioner been shot in the bedroom after
22 he was disarmed, then a juror would expect bullet fragments to be found in the bedroom
23 and would expect an exit wound because Petitioner would have been shot at point-blank
24 range—neither occurred. The evidence demonstrates that Petitioner was shot on the stairs,
25 as the police testified.

26 Petitioner’s objections are unavailing and self-serving. He claims that the police
27 officers manufactured the crime scene, (R&R Obj. 60), but provides no evidence to support
28 such an argument. Petitioner argues that police officers must use alternatives to lethal

1 force. (*Id.*) Yet, the police fired several non-lethal rounds that did not stop Petitioner.
2 Petitioner contends that nowhere in a police report or testimony does it state an officer saw
3 the rifle being fired, which he suggests discredits the officers' testimony. (*Id.* at 61.)
4 Rather, he contends that the officers modified the evidence and the crime scene. (*Id.*) Even
5 if the jury were to completely discount the police testimony, sufficient objective evidence,
6 such as the bullet fragment location, corroborates the police version of events. No such
7 evidence exists to support Petitioner's claim. Therefore, the jury had sufficient evidence
8 to allow it to find Petitioner guilty beyond a reasonable doubt of violating Penal Code § 69.
9 Thus, there was no excessive force claim.

10 Accordingly, the Court **OVERRULES** Petitioner's Objections and **ADOPTS** Judge
11 Skomal's R&R as to the fifth claim.

12 **VII. Claim Six: Chain of Custody**

13 Petitioner's sixth claim is that the chain of custody for the hammer was improper
14 because the police did not find the hammer while searching the house. Instead, his relatives
15 found the hammer while cleaning the bedroom and picked it up with their bare hands, thus
16 contaminating the evidence. (Petition 27, 47, 58.) Judge Skomal characterized Petitioner's
17 claim as speculative. Further, Petitioner has not demonstrated how any defects in the chain
18 of custody actually harmed his constitutional rights. (R&R 40–41 (citing *People v. Catlin*,
19 26 Cal. 4th 81, 134 (2001); and *People v. Hall*, 187 Cal. App. 4th 282, 294 (Ct. App.
20 2010)).) Judge Skomal concluded that Petitioner has not demonstrated that his due process
21 rights were violated by the manner in which the hammer was found or how the evidence
22 was handled after it was found. (*Id.* at 41.)

23 Petitioner objects on the grounds that a prosecutor must establish a proper foundation
24 to use evidence at trial. (R&R Obj. 73 (citing Cal. Evid. Code §353).) He further argues
25 that the only witness that testified as to the evidence was Milford, but because Milford
26 allegedly abused Beverly, Beverly should have been allowed to testify at trial. (*Id.*) Next,
27 Petitioner contends that because the evidence was obtained through an unlawful search, the
28 evidence should have been excluded. (*Id.* at 74.) Petitioner reasons that his rights were

1 violated because the police investigators thoroughly searched the room and did not find the
2 hammer, but a private citizen was able to find the hammer with relative ease. (*Id.*) Further,
3 Petitioner’s privacy rights were violated by his family members searching for evidence.
4 (*Id.* at 75.)

5 A federal habeas court does not sit in review of purported violations of state
6 evidentiary issues. *See Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Rather,
7 a federal court only considers whether a defendant was denied his due process right to a
8 fundamentally fair trial and whether the “admission of the evidence so fatally infected the
9 proceedings as to render them fundamentally unfair.” *Id.* (citing *Kealohapauole v.*
10 *Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986), *cert. denied*, 479 U.S. 1068 (1987); *see*
11 *Reiger v. Christensen*, 789 F.2d 1425, 1430 (9th Cir. 1986) (“The . . . issue is not whether
12 introduction of [the evidence] violated state law evidentiary principles, but whether the
13 trial court committed an error which rendered the trial so arbitrary and fundamentally unfair
14 that it violated federal due process.”).

15 Petitioner’s piecemeal arguments does not speak to the ultimate issue in his sixth
16 claim: how specifically did a supposed defect in the chain of custody render his trial
17 fundamentally unfair. First, Petitioner has not established that there was a defect in the
18 chain of custody. The California Court of Appeal has summarized the relevant standard as
19 follows:

20 A chain of custody is adequate when the party offering the
21 evidence shows to the satisfaction of the trial court that, “taking
22 all the circumstances into account including the ease or difficulty
23 with which the particular evidence could have been altered, it is
24 reasonably certain that there was no alteration.” The reasonable
25 certainty requirement is not met when some “vital link in the
26 chain of possession is not accounted for, because then it is as
27 likely as not that the evidence analyzed was not the evidence
28 originally received. Left to such speculation the court must
exclude the evidence.” However, when there is only the barest
speculation that the evidence was altered, “it is proper to admit
the evidence and let what doubt remains go to its weight.”

1 *Hall*, 187 Cal. App. 4th at 294 (internal citations and quotation marks omitted) (citing
2 *Catlin*, 26 Cal. 4th at 134). Here, Petitioner speculates that the mere fact that his relatives
3 found the hammer resulted in some sort of contamination. Petitioner does not explain what
4 contamination occurred. In contrast, Petitioner’s trial counsel pointed to the fact that only
5 Milford and Beverly’s DNA were found on the hammer in her closing argument. (RT 616.)
6 Petitioner acknowledged that only Milford and Beverly’s DNA was on the hammer. (R&R
7 Obj. 73.) A juror might expect a contaminated hammer to have DNA from third parties;
8 yet, this was not the case. There is no direct evidence that a third party altered the chain of
9 possession. Petitioner’s argument is the “barest [of] speculation” rather than a “vital link
10 in the chain of possession” was not accounted for. *Hall*, 187 Cal. App. 4th at 294. Under
11 California law, a trial court could have found the evidence to be admissible.

12 This Court does not sit in review of state evidentiary rules, but the lack of evidence
13 to support a chain of custody argument favors the conclusion that there was no fundamental
14 unfairness in the trial. The fact that only Beverly and Milford’s DNA was found on the
15 hammer demonstrates that no other party contaminated the evidence. Petitioner’s
16 remaining objections speak to claims addressed in other sections. For example, he accuses
17 his defense counsel of failing to object to the evidence and failing to apply for the
18 exclusionary rule. (R&R Obj. 74.) He contends that Beverly should have been allowed to
19 testify at trial. He points to inconsistencies in Christopher’s testimony. None of these
20 arguments demonstrate a fundamental unfairness in the trial resulting from the chain of
21 custody of the hammer. Therefore, the Court finds that Petitioner has not demonstrated
22 any fundamental unfairness resulting from a purported defect in the chain of custody.

23 The Court **OVERRULES** Petitioner’s objections and **ADOPTS** Judge Skomal’s
24 R&R as to Petitioner’s sixth claim.

25 **VIII. Claim Seven: Ineffective Assistance of Counsel**

26 Petitioner argues his trial counsel was ineffective for three reasons. First, he
27 generally argues that his counsel should have challenged the police officer’s statements as
28 to what caliber bullet with which Officer Kaldenbach shot Petitioner. (Petition 53.)

1 Second, Petitioner contends that his counsel should have objected to photographs shown
2 at trial depicting substantial amounts of blood, which could have prejudiced the jury against
3 Petitioner. (*Id.* at 54.) Third, he asserts that his counsel failed to object to Christopher’s
4 testimony as it was hearsay and biased.⁷ (*Id.* at 41.)

5 Under federal law, “[t]he benchmark for judging any claim of ineffectiveness must
6 be whether counsel’s conduct so undermined the proper functioning of the adversarial
7 process that the trial cannot be relied on as having produced a just result.” *Strickland v.*
8 *Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, a
9 defendant must show: (1) that counsel’s performance was deficient; and (2) that the
10 deficient performance prejudiced the defense. *Id.* at 687. The proper measure of attorney
11 performance is “simply reasonableness under prevailing professional norms.” *Id.* at 688.
12 “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide
13 range of reasonable professional assistance;” that is, the defendant must overcome the
14 presumption that, under the circumstances, the challenged action might be considered
15 sound trial strategy. *Id.* at 689–90. To determine whether errors of counsel prejudiced the
16 defense, a court “must consider the totality of the evidence before the judge or jury” and
17 consider whether “the defendant has met the burden of showing that the decision reached
18 would reasonably likely have been different absent the errors.” *Id.* at 696. A court need
19 not address both the deficiency prong and the prejudice prong if the defendant fails to make
20 a sufficient showing of either one. *Id.* at 697.

21 The Court begins by discussing ineffective assistance of counsel claims raised, for
22 the first time, in Petitioner’s Objections to the R&R. Then, the Court reviews each of
23 Petitioner’s arguments raised in the Petition.

24 ///

25
26 ⁷ Respondent and Judge Skomal did not address Petitioner’s third argument—that his counsel should have
27 objected to Christopher’s testimony. This is understandable because Petitioner’s claims were scattered
28 across the entire Petition with minimal organization. However, Petitioner renewed this argument in his
Traverse. (Traverse 52.) Because Petitioner raised this claim in his Petition, the Court will analyze it in
this Order.

1 ***A. Ineffective Assistance of Counsel Claims Raised in R&R Objections***

2 As previously stated, Petitioner only raised three grounds for his ineffective
3 assistance of counsel in his Petition. In his Objections to the R&R, Petitioner raises new
4 ineffective assistance of counsel claims for the first time. These claims include, but are not
5 limited to: Petitioner did not have a contract with the attorney who represented him on
6 appeal, (R&R Obj. 35); the appellate attorney failed to state that evidence obtained by a
7 private citizen violated Petitioner's Fourth and Fourteenth Amendment rights, (*id.* at 39);
8 Petitioner's trial counsel failed to show that Beverly had been seen by a psychiatrist prior
9 to asking for a competency hearing, (*id.* at 44); and Petitioner's trial counsel should not
10 have "eliminated" Beverly as a witness to testify at trial, (*id.* at 45).

11 These new allegations all suffer from a common defect; Petitioner did not raise them
12 in his Petition, or even his Traverse. The law is clear that a district court has the discretion
13 to consider new habeas claims or evidence raised for the first time in an objection to a
14 magistrate judge's R&R. *Brown v. Roe*, 279 F.3d 742, 744–45 (9th Cir. 2002); *United*
15 *States v. Howell*, 231 F.3d 615, 621–22 (9th Cir. 2000). Because Petitioner raised these
16 new claims in his Objections, he deprived the California courts, Respondent, and
17 Magistrate Judge Skomal the opportunity to hear and respond to his claims. Therefore, the
18 Court exercises its discretion and does not consider Petitioner's newly raised ineffective
19 assistance of counsel claims.

20 ***B. Failure to Challenge False Statements***

21 Petitioner argues trial counsel was ineffective for failing to challenge testimony
22 regarding the bullet caliber with which the police shot Petitioner. Judge Skomal explains
23 Petitioner's argument as follows:

24 He states that he told defense counsel that the surgeon told his
25 assistant that he removed fragments of a 9-millimeter bullet, and
26 that an MRI shows that he currently has a 9-millimeter bullet in
27 his body, but counsel did not present that evidence at trial.
28 (Traverse at 11.) His surgeon testified at trial that Petitioner had
 an entry wound from a bullet, but no exit wound, and that a CAT

1 scan revealed eight bullet fragments in his body, which is typical
2 when a bullet hits a bone. (RT 387–88.)

3 (R&R 42.) Petitioner’s theory is that the police officer’s AR-15 rifle was a .223 caliber
4 round and therefore his counsel was deficient for failing to challenge the testimony as to
5 the bullet caliber. (*See id.*) Judge Skomal concludes that Petitioner does not identify how
6 he knows that the surgeon would have testified that the fragments were from a 9-millimeter
7 bullet had he been called to testify. (*Id.*)

8 Petitioner responds that his attorney withheld evidence from the court in violation
9 of various state statutes and ethical rules. (R&R Obj. 76.) He states the following,
10 “Defence [sic] counsel knew before and during discovery, the exact caliber of the bullet
11 that the petitioner was shot with.” (*Id.*) Petitioner further states that his counsel had in her
12 possession the report from Scripps Hospital that “all the fragments” were in Petitioner’s
13 body and not in the ceiling as the prosecution’s witnesses stated. (*Id.* at 77.)

14 Petitioner’s argument hinges on his contention that his counsel knew that the
15 prosecution was lying about the bullet caliber used to shoot Petitioner and erred by failing
16 to investigate or challenge the prosecution. His ineffective assistance of counsel argument
17 further requires that such an error, if true, prejudiced his defense. As Judge Skomal points
18 out, Petitioner’s objections offers no basis for his statement that the bullet fragment was
19 determined to be from a 9-millimeter bullet and not a .223 caliber bullet. Petitioner
20 included in his Objections copies of what appears to be the laboratory results from when
21 he was shot. The report states: “Bullet small fragments noted to overlie the left chest, and
22 the large main piece of the bullet is noted to overlie the right chest.” (*Id.* at 70.) There is
23 no further description of the bullet fragments and no reason to suggest a 9-millimeter shell
24 was fired. Dr. Fady Nasrallah, the physician who attended both Beverly and Petitioner,
25 testified that she treated Petitioner for a bullet wound to his shoulder. (RT 376.) She
26 further testified that she believed that the bullet wound was an entry wound because there
27 was no exit wound and that a CAT scan revealed eight metal fragments inside Petitioner’s
28

1 body. (*Id.* at 387–88.) There is no testimony regarding the caliber of bullet or an
2 opportunity for her to determine the caliber.⁸

3 Petitioner puts forward no evidence or citation to the record demonstrating how he
4 knows the bullet caliber was a 9-millimeter rather than a .223 bullet. The burden is on
5 Petitioner to show how his counsel was deficient, but conclusory statements that his
6 counsel failed to pursue the bullet caliber issue does not suffice. For example, Petitioner
7 states that a ballistic report would have been created for an officer-involved shooting, but
8 does not cite to evidence of such a report in the record. Even if Petitioner was able to prove
9 the bullet caliber was a 9-millimeter, such a finding would not alter the trial’s outcome.
10 The jury had additional, sufficient evidence to find that the police officers used reasonable
11 force and that Petitioner resisted arrest. *See supra* section VI. Petitioner’s counsel was not
12 deficient for failing to inquire about the bullet caliber. Therefore, Petitioner fails to state a
13 claim for ineffective assistance of counsel as to the bullet caliber argument.

14 ***C. Failure to Object to Introduction of Photographic Evidence***

15 Petitioner alleges his defense counsel should have objected to the introduction of
16 inflammatory photographs of blood at the scene of the crime. (Petition 54.) Judge Skomal
17 explains that several witnesses testified that Beverly was bleeding profusely when the
18 police arrived at her house. (R&R 43.) Beverly told the 911 dispatcher that “I am bleeding
19 to death.” (*Id.* (quoting Lodgment No. 2, at 13).) Officer Weber testified that he saw large
20 amounts of blood on the kitchen floor. (RT 209.) Judge Skomal surveyed the defense
21 counsel’s efforts in regard to the photographs. Petitioner’s counsel filed a pre-trial motion
22 to exclude the photographs and she argued to the jury that it was uncertain whose blood
23 was on the floor of the kitchen. (R&R 43 (citing CT 25–26).) Judge Skomal concluded
24 that Petitioner had not demonstrated that defense counsel’s performance was deficient.
25 (*Id.*)

26
27 ⁸ For example, one would not expect a trauma physician to be able to reconstruct fragments of a bullet
28 and determine its forensics. This cuts against Petitioner’s claims that his attorney should have asked Dr.
Nasrallah about the caliber of the bullet.

1 In response, Petitioner acknowledges that his counsel filed pretrial motions seeking
2 to exclude the photographs, but contends that an objection still should have been made at
3 trial. (R&R Obj. 79–80.) Petitioner offers no further objections to the R&R as to this
4 argument. The Court agrees with Judge Skomal; as Petitioner acknowledges, defense
5 counsel attempted to exclude the photographs before trial. When the trial court ruled
6 against Petitioner, his defense counsel did not give up but instead argued to the jury that
7 they could not be certain as to whose blood was depicted in the photographs. Petitioner’s
8 only rebuttal is that defense counsel should have objected when the photographs were
9 offered. Petitioner does not explain how an objection would have prevailed where a pretrial
10 motion failed. And, his defense counsel had the capacity to make tactical trial decisions.
11 *See Strickland*, 466 U.S. at 689 (instructing courts to “evaluate the conduct from counsel’s
12 perspective at the time” and “indulge a strong presumption that counsel’s conduct falls
13 within the wide range of reasonable professional assistance”). Therefore, the lack of
14 objection was a tactical decision committed to Petitioner’s trial counsel.

15 Furthermore, even if his trial counsel erred by failing to object, a substantial amount
16 of other sufficient, independent evidence existed that would allow the jury to find Petitioner
17 guilty beyond a reasonable doubt. *See Featherstone v. Estelle*, 948 F.2d 1497, 1507 (9th
18 Cir. 1991). *See, e.g., supra* section I (discussing sufficiency of evidence as to elder abuse
19 charge). Therefore, any failure to object amounts to harmless error.

20 ***D. Failure to Object to Christopher’s Testimony***

21 In his Petition, Petitioner contends that his trial counsel should have challenged his
22 Christopher’s testimony because he made false claims, was biased because Christopher did
23 not want Petitioner to receive any payment from the family trust, and his testimony was
24 hearsay. (Petition 41.) In his R&R Objection, Petitioner further contends that his counsel
25 should have objected to the illegal search of his premises that resulted in the seizure of
26 evidence, presumably the hammer that Gina found. (R&R Obj. 80.)

27 The trial record reveals that defense counsel objected to several statements
28 Christopher made during his testimony. (RT 87–89.) She also asked Christopher on cross

1 examination who found the hammer. (*See id.* at 82–84.) At closing argument, defense
2 counsel pointed out that the police did not find the hammer when they searched the
3 bedroom, but Petitioner’s relatives did find it. (*Id.* at 616–17.) Taken together, Petitioner
4 has not illustrated how his counsel’s performance was deficient. Defense counsel objected
5 to Christopher’s testimony where it was appropriate to do so. The Court finds that
6 Petitioner has not demonstrated that his counsel’s performance was constitutionally
7 deficient.

8 The Court **OVERRULES** Petitioner’s objections and **ADOPTS** the R&R as to this
9 claim.

10 **IX. Petitioner’s Request for Evidentiary Hearing**

11 Petitioner requests that the Court conduct an evidentiary hearing. (*See* Traverse 7.)
12 Judge Skomal recommends denying the evidentiary hearing request. (R&R 45–46.) A
13 district court presented with a request for an evidentiary hearing “must determine whether
14 a factual basis exists in the record to support the petitioner’s claim.” *Baja v. Ducharme*,
15 187 F.3d 1075, 1078 (9th Cir. 1999). If the petitioner has failed to develop the factual
16 basis, the Court must deny a hearing “unless the applicant establishes one of the two narrow
17 exceptions set forth in § 2254(e)(2)(A) & (B).”⁹ *Id.* (citing *Cardwell v. Greene*, 152 F.3d
18 331, 337 (4th Cir. 1998)). If the petitioner has not “failed to develop” the facts in state
19
20
21

22 ⁹ 28 U.S.C §2254(e)(2) provides:

23 [T]he court shall not hold an evidentiary hearing on the claim unless the applicant shows
24 that—

25 (A) the claim relies on—

26 (i) a new rule of constitutional law, made retroactive to cases on collateral review
27 by the Supreme Court, that was previously made unavailable; or

28 (ii) a factual predicate that could not have been previously discovered through the
exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing
evidence that but for constitutional error, no reasonable factfinder would have found the
applicant guilty of the underlying offense.

1 court, “the district court may proceed to consider whether a hearing is appropriate, or
2 required.” *Id.* (citing *Cardwell*, 152 F.3d at 337).¹⁰

3 The Court finds no basis for an evidentiary hearing because no factual basis exists
4 to support Petitioner’s arguments and Petitioner has also not established that either of the
5 exceptions in § 2254(e)(2) apply here. Thus, the Court **DENIES** the request for an
6 evidentiary hearing.

7 **X. Certificate of Appealability**

8 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a
9 district court’s denial of his petition, but may only appeal in certain circumstances. *Miller–*
10 *El v. Cockrell*, 537 U.S. 322, 335–36 (2003). The federal rules governing habeas cases
11 brought by state prisoners require a district court that dismisses or denies a habeas petition
12 to grant or deny a certificate of appealability in its ruling. *See* Rule 11(a), Rules Governing
13 § 2254 Cases, 28 U.S.C. foll. § 2254. For the reasons set forth above, Petitioner has not
14 shown “that reasonable jurists of reason would find it debatable whether the district court
15 was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 743, 484 (2000).
16 Accordingly, the Court **DECLINES** to issue a certificate of appealability.

17 **CONCLUSION**

18 For the foregoing reasons, the Court **OVERRULES** Petitioner’s Objections,
19 **ADOPTS** the R&R and **DENIES** each claim of Petitioner’s Petition for Habeas Corpus,
20 (ECF No. 1).

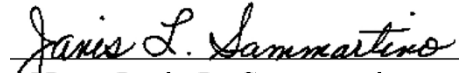
21 ///

22
23
24
25 ¹⁰ An evidentiary hearing is required if any of the following six factors are met: (1) the merits of the factual
26 dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by
27 the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to
28 afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the
material facts were not adequately developed at the state-court hearing; and (6) for any reason it appears
that the state trier of fact did not afford the habeas applicant a full and fair hearing. *Townsend v. Sain*, 372
U.S. 293, 313 (1963). The Court finds these factors are not met.

1 The Court further **DENIES AS MOOT** Petitioner's Motion for Review, (ECF No. 48) and
2 **GRANTS** Petitioner's *ex parte* Motion, (ECF No. 50). The Clerk **SHALL** close the file.

3 **IT IS SO ORDERED.**

4 Dated: July 16, 2018


Hon. Janis L. Sammartino
United States District Judge